THE FEDERAL APPROACH—CONSTITUTIONAL GROUNDS FOR RELIEF

I. INTRODUCTION

In July 1965, the Governor of Ohio signed into law a post-conviction remedy statute.[1] The purpose of the statute is to serve as a substitute for habeas corpus and to insure a corrective remedy for persons convicted in proceedings which did not conform to constitutional standards.[2] Section 2953.21 should also ease the strain of the courts situated in the area where the correctional institutions are located, since the motion under the new statute is made to the sentencing court, not the courts of the county where the prisoner is confined.[3] The administrative advantages of such a procedure are persuasive; it will enable those connected with the trial proceedings to testify where it is both more convenient and inexpensive.

At first glance, there may be at least two drawbacks to section 2953.21. The first concerns the "finality" factor, which centers on the concept that at some time litigation should come to an end.[4] The second drawback centers on the fact that the hearing is held before the same court that convicted the defendant; quite possibly before the same judge and prosecutor who convicted him. If the claim is that the conviction is unconstitutional because of an impropriety on the part of the judge, will the court admit that it made a mistake?

Prior to the enactment of the statute, a prisoner seeking relief by means of collateral attack would have made use of habeas corpus. Section 2953.21 should minimize the use of habeas corpus by serving as a substitute for the writ in many areas. While it is too early to determine the exact scope of the new statute, the federal courts have used a similar, although not identical, statute since 1948—section 2255 of title 28 of the United States Code.[5] The purpose of this comment is to analyze two particular areas of section 2255 in order to establish guidelines for the possible interpretation of the new Ohio statute.

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[1] Ohio Rev. Code Ann. §§ 2953.21-.24 (Page Supp. 1965).

[2] Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1965) states in part: "that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States. . . ."

[3] Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1965) states in part: "A prisoner . . . may file a verified petition at any time in the court which imposed sentence . . . ."

[4] See Amsterdam, "Search, Seizure, and Section 2255: A Comment," 112 U. Pa. L. Rev. 378, 383-84 (1964), for a discussion of the various aspects of the finality factor.

[5] 28 U.S.C. § 2255 (1959). For text of statute see Comment, "The Federal Approach—Scope and Availability of Section 2255," 27 Ohio St. L.J. 302, 303 n.3 (1966).

II. Constitutional Grounds Under Section 2255

This section will concentrate on the first of the four grounds of relief set out in section 2255, *i.e.*, "that the sentence was imposed in violation of the Constitution or laws of the United States." Ohio lawyers should bear in mind that these grounds are based upon rights guaranteed by the federal constitution and should be recognized in Ohio under the new statute, since federal relief establishes the minimum requirements of due process.

Another factor which should be noted is that constitutional rights, like other rights, can be waived. For example, while a denial of the right to counsel is a ground for collateral attack, one may validly waive his right to such counsel and thereby deprive himself of a ground for relief. The classic statement on what constitutes a proper waiver is found in *Johnson v. Zerbst:*[6] "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." This is still the controlling standard.[7] Under this formulation, waiver may not be implied from a silent record, rather, the record must show, or there must be an averment and evidence which shows, that the accused intelligently and understandingly waived.[8] Similarly, waiver should not be implied by the bare failure to act.[9] Understandably, the cases silently illustrate that courts are more willing to find waiver of constitutional rights when the petitioner was represented by counsel at the trial and failed to raise the issue there or on direct appeal.[10]

The following list of grounds is not intended to be exhaustive. However, it is hoped that by comparing grounds which are sufficient with those which are insufficient, the reader will be able to better evaluate the merits of any possible ground raised for collateral relief.

A. *Insufficient Grounds*

1. Error in the Indictment or Information

In most cases, procedural errors concerning the indictment or the information are not treated as grounds for vacation of the prisoner's sentence in a section 2255 proceeding, but must be raised on appeal,

[6] 304 U.S. 458, 464 (1938). See also Moore v. Michigan, 355 U.S. 155 (1957); Walker v. Peppersack, 316 F.2d 119 (4th Cir. 1963); United States v. Reincke, 229 F. Supp. 132 (D. Conn. 1964).

[7] Fay v. Noia, 372 U.S. 391, 439 (1963).

[8] Carneby v. Cochran, 369 U.S. 506 (1962).

[9] See United States v. LaVallee, 330 F.2d 303 (2d Cir. 1964). See generally Cobb v. Balcom, 339 F.2d 95 (5th Cir. 1964); United States v. Rundle, 337 F.2d 268 (3d Cir. 1964); Spaulding v. Taylor, 234 F. Supp. 747 (D. Kan. 1964).

[10] See generally Starrs, "The Post-Conviction Hearing Act—1949-1960 and Beyond," 10 De Paul L. Rev. 397, 407 (1961).

unless exceptional circumstances are shown.[11] The reason for this rule can be understood by remembering that the function of section 2255 is to serve as a substitute for habeas corpus and not to expand the grounds for collateral attack. Under habeas corpus, slight defects in the indictment were not a ground for collateral attack.[12]

This rule is subject to certain exceptions, such as when the indictment or information shows that the court lacked jurisdiction of the prisoner,[13] or when the indictment or information fails to charge an offense under any reasonable construction[14] or charges a nonexistent federal offense.[15] A further exception is when the indictment charges the defendant with a federal crime, but shows on its face that the defendant did not commit the crime.[16]

It should be noted that it is rare for any of these exceptional circumstances to occur. This is especially true when the defendant was represented by counsel, and there was no objection to the indictment at the trial or on appeal.[17] Perhaps the real reason for refusing to allow this ground is that if the objection had been made at an early stage, the error could have been corrected and the result of the case would not have been materially changed.[18] Of course, an indictment which indicated that the statute of limitations had run, and that the defendant could no longer be prosecuted, could not be sufficiently corrected.[19]

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[11] See, *e.g.*, Stegall v. United States, 259 F.2d 83 (6th Cir. 1958) (indictment); Barnes v. United States, 197 F.2d 271 (8th Cir. 1952) (information).

[12] In Knewal v. Eagan, 268 U.S. 442 (1925), the Supreme Court gave the reasons for this rule at 446:

> It is fundamental that a court upon which is conferred jurisdiction to try an offense, has jurisdiction to determine whether or not that offense is charged or proved. Otherwise, every judgment of conviction would be subject to collateral attack and review on *habeas corpus* on the ground that no offense was charged or proved. It has been uniformly held by the Court that the sufficiency of the indictment cannot be reviewed in *habeas corpus* proceedings.

[13] Hilderbrand v. United States, 261 F.2d 354 (9th Cir. 1958), United States v. Hanis, 133 F. Supp. 796 (W.D. Mo. 1955).

[14] Gibson v. United States, 244 F.2d 32 (4th Cir. 1957).

[15] Barnes v. Hunter, 188 F.2d 86, 89 (10th Cir. 1951).

[16] *Ibid.* For example, if the defendant is charged with transporting in interstate commerce stolen property of the value of $5,000, and the indictment alleges that the value of the property in question was $2,500, the indictment would not state an offense.

[17] *E.g.*, United States v. Nicherson, 211 F.2d 909 (7th Cir. 1954); Lucas v. United States, 158 F.2d 865 (4th Cir. 1946).

[18] The doctrine of waiver is important in this area. Should the defendant plead guilty, he waives any defect in the indictment. Edwards v. United States, 256 F.2d 707 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958).

[19] Askins v. United States, 251 F.2d 909, 913 (D.C. Cir. 1958) (dictum).

2. Error in Rulings on Evidence

Except in possibly extreme circumstances, the question of the sufficiency or inadmissibility of the evidence cannot be raised on a motion to vacate the sentence, but must be raised on direct appeal.[20] Thus, the scope of complaints concerning the evidence is somewhat narrower under a section 2255 proceeding than on appeal. This is due to the fact that the regularity of the proceedings, not the guilt of the accused, is being tested in a section 2255 proceeding. It would seem that the only instances when the insufficiency or inadmissibility of the evidence could be urged would be those cases when the use of such evidence amounted to a denial of due process.

3. The Conduct of the Trial Judge

Normally, the conduct of the trial judge is insufficient to be a ground for collateral attack unless his conduct constitutes plain (prejudicial) error,[21] such as refusing the accused counsel or influencing the defendant to plead guilty.[22] While it is axiomatic that the right to a fair trial is guaranteed by the federal constitution and that this rule includes an impartial judge,[23] impartiality requires only an absence of actual bias in the trial of the case.[24] This means that a judge is not disqualified to sit in a criminal proceeding merely because he has an opinion as to the guilt of the accused, or is convinced of his guilt.[25]

The conduct of the trial judge is also related to the constitutional right to a fair and impartial jury. The problem is presented in cases where there is considerable publicity of the trial from the newspapers

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20 Malone v. United States, 257 F.2d 177 (6th Cir. 1958) (dictum).

21 Fennell v. United States, 229 F. Supp. 451 (N.D. Okla. 1964), *aff'd*, 339 F.2d 920 (10th Cir. 1965). A "plain" error is an error which affects substantial rights; as opposed to a "harmless" error, which is one that does not affect substantial rights. See Fed. Rules Crim. P. 52. The court in Herzog v. United States, 226 F.2d 561, 569 (9th Cir. 1955), stated: "[A]ll error is either 'Harmless' or 'Plain' depending upon whether it affects substantial rights. It cannot be disputed 'Plain' error and prejudicial error mean the same thing, as prejudicial error is error which affects substantial rights."

22 Euziere v. United States, 249 F.2d 293 (10th Cir. 1957).

23 Tumey v. Ohio, 273 U.S. 510, 532 (1927).

24 *In re* Murchison, 349 U.S. 133, 136 (1955).

25 See Hendrix v. Hand, 312 F.2d 147 (10th Cir. 1962); United States v. Shotwell Mfg. Co., 287 F.2d 667, 672 (7th Cir. 1961), *aff'd*, 371 U.S. 341 (1963); United States v. Mroz, 136 F.2d 221, 224 n.4 (7th Cir.), *cert. denied*, 320 U.S. 805 (1943). *But see* Tumey v. Ohio, 273 U.S. 510, 532 (1927): "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law."

and other news media which presumably creates prejudice against the defendant in the eyes of the community.[26] In *United States v. Robinson*,[27] the petition alleged that the defendant was denied a fair and impartial jury. However, the court found that this ground was without merit in a section 2255 proceeding and must be raised on appeal. The court determined that the judge had been careful in the selection of the jury, and had also given adequate cautionary instructions to the jury. Moreover, the defendant, who had considerable education had failed to make use of the other avenues of correcting the error, if any in fact existed.

The *Robinson* case points out two of the serious drawbacks of allowing the denial of an impartial jury as a ground for collateral relief. First, there are several ways of correcting such errors besides the use of collateral attack. When the defendant believes that the pretrial publicity has made it difficult for him to have an impartial jury, he may move for a change of venue,[28] or for a continuance until the public clamor has subsided.[29] When publicity believed to be prejudicial occurs during the trial, the defendant can move for a mistrial, or request the trial judge to caution the jury to keep an open mind.[30] And, of course, the defendant can perfect an appeal. The availability of these procedures implies that the defendant waived or consciously elected not to seek either a different jury, or direct review. Several facts weigh heavily against one urging this contention for the first time by means of collateral attack, *i.e.*, that there are several ways to correct the error, that at some point litigation must come to an end,[31] and that section 2255 is not a substitute for appeal.

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[26] See, *e.g.*, Sheppard v. Maxwell, 346 F.2d 707 (6th Cir.), *cert. granted*, 382 U.S. 916 (1965). See also Estes v. United States, 381 U.S. 532 (1965), which held televising the defendant's trial over defendant's objections was inherently invalid as violating the due process clause.

[27] 143 F. Supp. 286 (W.D. Ky. 1956); see also United States v. Rosenberg, 200 F.2d 666 (2d Cir. 1952).

[28] In Ohio, on defendant's motion, the trial judge can grant a change of venue to a distant locale in the same state which is less concerned with the crime. Ohio Rev. Code Ann. § 2311.38 (Page 1954). See Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

[29] See Larson v. United States, 275 F.2d 673 (5th Cir. 1960).

[30] Larson v. United States, *supra* note 29; United States v. Rosenberg, 200 F.2d 666, 668-70 (2d Cir. 1952), *cert. denied*, 345 U.S. 965 (1954).

[31] See Bowen v. United States, 192 F.2d 515, 517 (5th Cir. 1951), where the court stated: "it is also of the essence: that the government be enabled to control the governed and to that end that judgments have finality; and that trials, conducted in accordance with law and ending in conviction, some day be at an end."

B. *Sufficient Grounds*

1. The Coerced Plea of Guilty

A coerced plea of guilty is inconsistent with due process of law, and is a ground for relief under section 2255.[32] A defendant has a right to stand trial and to require the government to establish the charges against him in accordance with procedural and substantive due process. Of course, a defendant may obviate the required proof by pleading guilty, which has the impact of a jury's verdict of guilty. However, both rule 11 of the Federal Rules of Criminal Procedure[33] and the interpretations of due process[34] require the court to accept a plea of guilty only when such plea is made knowingly and voluntarily. When a guilty plea is the product of physical or mental coercion, ignorance, fear, or inadvertence, the plea is void in federal court.[35]

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[32] See Machibroda v. United States, 368 U.S. 487 (1962).

[33] Fed. R. Crim. P. 11, provides in part: "the court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." This rule is substantially a restatement of existing law and practice. See Fogus v. United States, 34 F.2d 97 (4th Cir. 1929). See generally Notes of Advisory Committee on Rules, 18 U.S.C. (1961) (rule 11).

[34] A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. Machibroda v. United States, 368 U.S. 487, 493 (1962). See Shelton v. United States, 356 U.S. 26 (1958), *reversing* 246 F.2d 571 (5th Cir. 1957) (per curiam); Waley v. Johnston, 316 U.S. 101 (1942); Walker v. Johnston, 312 U.S. 275 (1941); Kercheval v. United States, 274 U.S. 220 (1927).

This should apply to an Ohio conviction by means of the fourteenth amendment. See Mooney v. Holshan, 294 U.S. 103, 112-13 (1935). The importance of determining if the plea was voluntary cannot be overestimated in Ohio. For example, by voluntarily pleading guilty to the indictment while represented by counsel, the defendant waives errors or irregularities in preliminary proceedings prior to indictment. Gifford v. Maxwell, 177 Ohio St. 77, 202 N.E.2d 424 (1964). See also Shelton v. Haskins, 176 Ohio St. 296, 199 N.E.2d 598 (1964), which held the prisoner's conviction could not be considered invalid, although it rested upon evidence obtained by unlawful search and seizure, since defendant entered a plea of guilty and was convicted upon such plea without a trial or introduction of any evidence. *Accord*, Poe v. Maxwell, 177 Ohio St. 28, 201 N.E.2d 703 (1964). Similarly, even if an accused is illegally detained after his arrest and during such detention makes what would be considered a coerced confession, if the accused pleads guilty, and the confession is not used, the mere fact that the coerced confession existed does not effect the validity of this subsequent plea of guilty. Caldwell v. Haskins, 176 Ohio St. 261, 199 N.E.2d 116 (1964). But the fact that the defendant knows the State is ready with a coerced confession seems to make the plea something less than voluntary. Further, an Ohio defendant has the burden of proving that the confession was involuntary. City of Columbus v. Bosley, 73 Ohio L. Abs. 185, 136 N.E.2d 426 (Ct. App. 1956).

[35] See United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963), and cases cited therein.

There is no one test which a court can use to determine if a plea is properly made. However, it seems proper for a court to weigh psychological factors which may reasonably be expected to influence one who is on trial. One must distinguish the cases in this area on the basis of the source of the coercion. If the coercion results from the words or acts of a judge, a post-conviction remedy may be more likely to exist.[36]

There are three situations in which the judge takes no active role in the coercion. The first occurs when the government has convincing evidence of the accused's guilt, and the accused, with or without the advice of counsel, pleads guilty. In the absence of evidence that the defendant was unaware of his rights[37] or that an expectation of leniency was induced by the government, the fact that the defendant pleaded guilty in an attempt for leniency is insufficient for post-conviction relief.[38]

A second situation occurs when the government threatens the defendant and thereby induces the plea,[39] or promises leniency.[40] Most courts are in justifiable agreement that in either of these situations, the plea is involuntary and the conviction void.

A third situation exists where the prosecution offers the defendant a "deal" in return for a plea of guilty. For example, the prosecutor may offer to drop certain counts of the indictment or to make recom-

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[36] One case in point is United States v. Tateo, *supra* note 35. In that case, there were several charges against the defendant, including one for kidnapping. After the government had placed substantial evidence before the court, the district judge consulted with counsel in chambers. At that time, the judge advised defendant's counsel that if the accused finished the trial and was found guilty, the court would impose a life sentence on the kidnapping charge and the maximum sentences under the other charges. When informed of this, the accused entered a plea of guilty. The court then complied with the formal requirements of rule 11 so that the record reflected that the plea was entered voluntarily and understandingly. Later, the defendant filed a motion to vacate his sentence, alleging that the fear of spending the rest of his life in prison led him to plead guilty, and that this fear, initiated by the judge's remarks, rendered his plea of guilty involuntary. The district court held a hearing and determined that the petitioner was entitled to relief, giving considerable significance to the emotional impact of the judge's words upon the defendant. The court further reasoned that any choice the defendant had was severely limited by the judge's statement. Moreover, the court held that the question of whether the trial court intended to influence the defendant by his remarks or not was immaterial, because the effect was the same.

[37] Watts v. United States, 278 F.2d 247 (D.C. Cir. 1960).

[38] United States v. Taylor, 303 F.2d 165 (4th Cir. 1962).

[39] See Machibroda v. United States, 368 U.S. 487 (1962).

[40] United States v. Taylor, 303 F.2d 165 (4th Cir. 1962); United States v. Lester, 247 F.2d 496 (2d Cir. 1957).

mendations for a lighter sentence. Normally, such procedures are not considered coercive and do not void the plea.[41]

2. Evidence Obtained by Illegal Search and Seizure

Four reasons have been given by the United States Supreme Court as a basis for the exclusionary rule in search and seizure cases: (1) it provides the victim with an effective remedy;[42] (2) it prevents the government from profiting by its own wrong;[43] (3) it preserves the integrity of the court;[44] and (4) it deters the police from similar further misconduct.[45] Recently, federal courts have parlayed these reasons in order to grant relief where the claim was predicated upon an illegal search.[46] These decisions, in conjunction with *Mapp v. Ohio*,[47] and *Fay v. Noia*,[48] show that search and seizure presents a constitutional issue and therefore is a ground for collateral attack.[49] Two points should be noted: first, the courts which have granted relief on this ground have ignored several earlier decisions to the contrary;[50] and second, *Mapp v. Ohio* is to operate prospectively only.[51]

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41 See generally Schwartz, Professional Responsibility and the Administration of Criminal Justice 27 (1961); Breitel, "Controls in Criminal Law Enforcement," 27 U. Chi. L. Rev. 427, 432 (1960); Newman, "Pleading Guilty for Considerations: A Study of Bargain Justice," 46 J. Crim. L., C. & P.S. 780 (1956); Note, "Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas," 112 U. Pa. L. Rev. 865 (1964). By pleading guilty, the defendant may waive several avenues of defense. See, *e.g.*, Anderson v. United States, 338 F.2d 618 (9th Cir. 1964) (guilty plea waives defense of entrapment); Kennedy v. United States, 259 F.2d 883 (5th Cir. 1958) (guilty plea waives failure to arraign); Edwards v. United States, 256 F.2d 707 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958) (guilty plea waives illegal arrest and questioning).

42 Mapp v. Ohio, 367 U.S. 643, 651 (1961).

43 Olmstead v. United States, 277 U.S. 438, 483-85 (1928) (dissenting opinion).

44 *Id.* at 469, 471. See also Irvine v. California, 347 U.S. 128, 150 (1954) (dissenting opinion).

45 Mapp v. Ohio, *supra* note 42, at 656.

46 Dillon v. Peters, 341 F.2d 337 (10th Cir. 1965); United States v. Rundle, 337 F.2d 268 (3d Cir. 1964); United States v. Reincke, 229 F. Supp. 132 (D. Conn. 1964).

47 367 U.S. 643 (1961).

48 372 U.S. 391 (1963).

49 Mapp v. Ohio, *supra* note 47, held that illegally seized evidence was inadmissible in a state court criminal case; the dictum in Fay v. Noia, *supra* note 48, suggests that all constitutional issues can be raised by collateral attack.

50 See, *e.g.*, Armstead v. United States, 318 F.2d 725 (5th Cir. 1963); Thompson v. United States, 315 F.2d 689 (6th Cir. 1963); United States v. Jenkins, 281 F.2d 193 (3d Cir. 1960). See also Williams v. United States, 307 F.2d 366 (9th Cir. 1962), which held questions concerning admissibility of evidence obtained by illegal search can be reviewed on appeal, but not by collateral attack.

51 Linkletter v. Walker, 381 U.S. 618 (1965). It should be noted that the Supreme Court has yet to explicitly determine that search and seizure is a basis for collateral

3. Denial of Counsel

The denial of an accused's right to counsel is a ground for collateral relief in federal as well as state courts.[52] However, there are two somewhat difficult problems in this area. The first concerns the question of what is a valid waiver, and the second relates to cases in which the petitioner alleges his counsel was incompetent. One may waive his right to counsel, but unless the waiver is knowingly and understandingly made, it is ineffective.[53] There is no precise test which a court may employ in determining whether or not there has been an intelligent waiver, and therefore the courts usually make this determination by examining the circumstances under which the waiver was made.[54]

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attack. Granted that the four reasons for allowing the exclusionary rule in search and seizure cases exist, there may be significant reasons for refusing to allow collateral relief. First, most due process rights are intended to preserve the accuracy of the guilt-finding process. The purpose is not achieved by the exclusionary rule in search and seizure. Second, there is the possibility that these claims can be made in numerous situations. For example, the claim could be the basis for collateral attack following a guilty plea, a trial, or an appeal, even if the issue had not been raised at any earlier proceeding. See generally Amsterdam, "Search, Seizure, and Section 2255: A Comment," 112 U. Pa. L. Rev. 378 (1964).

[52] Gideon v. Wainwright, 372 U.S. 335 (1963).

[53] United States v. Morgan, 222 F.2d 673 (2d Cir. 1955).

[54] See Starks v. United States, 264 F.2d 797 (4th Cir. 1959). These circumstances include prior experience of the defendant in court, the complexity of the offense, the possible defenses to the charges, the defendant's ability to comprehend the nature and substance of the charges against him, the care with which the court advised the defendant of his right to counsel, and the importance of waiver in the particular situation. See also United States v. Page, 229 F.2d 91 (2d Cir. 1956) (ability to comprehend the nature and substance of the charges); Powell v. United States, 174 F.2d 470 (5th Cir. 1949) (the care with which the court advised the defendant).

The trial judge may be required to make searching inquiries into each of these elements, even when the defendant maintains that he does not desire counsel. In some instances, this duty may mean that the trial judge must act as counsel would in explaining the proceedings to the defendant. See Van Moltke v. Gillies, 332 U.S. 708 (1948). See also Stachs v. United States, 264 F.2d 797, 799-800 (4th Cir. 1959). Of course, where the circumstances show that the defendant either did not understand his rights, or did not intelligently waive them, relief should be granted. A case in point is Arnold v. United States, 271 F.2d 440 (4th Cir. 1959). The evidence at the § 2255 proceeding showed that the clerk of courts asked the defendant whether he had an attorney, and whether he wished the court to appoint one. The defendant became speechless and pointed to the probation officer, then nodded his head indicating assent. The clerk, without further explanation read the information and accepted the waiver of indictment and guilty plea. The defendant had a mental condition at the time and appeared to be in need of treatment. The Fourth Circuit held that the defendant had not been subjected to the searching inquiry which must be made by the district court in order to determine whether there has been an intelligent and competent waiver of his rights to counsel and further, this duty could not be discharged in extrajudicial interviews by the probation officer.

Closely related to the denial of counsel question is the problem of incompetent or ineffective counsel. Lack of effective counsel is a ground for collateral attack.[55] However, the constitutional right to counsel does not mean the defendant must have the services of an attorney which meet any specific aptitude in point of professional skill. For example, common mistakes of trial strategy which prove damaging are not an adequate basis for attack on the competence of counsel.[56] Similarly, the mere fact that the accused was in good faith misled by his counsel should not warrant a motion to vacate, unless the trial was thereby reduced to a sham.[57]

An example of allegations sufficient to show incompetent counsel appeared in *Arellanes v. United States*.[58] The prisoner averred that he discharged his attorney because of (1) an alleged total failure to prepare for trial, and (2) counsel allegedly extorted funds from the defendant and his family for the purpose of buying a dismissal of the charges. The Ninth Circuit granted a hearing, saying: "If these most serious accusations of professional misconduct be taken as true, counsel's assistance was far from being constitutionally adequate. . . ."[59]

Before leaving the subject of counsel, it might be pointed out that generally counsel may be required to be appointed to assist in the preparation of a section 2255 petition even though the party so moving fails to make such a request.[60]

4. Insanity at the Time of the Trial

Insanity at the time of the trial is within the scope of section 2255 and may be used as a ground to collaterally attack a sentence.[61] It is

[55] Frand v. United States, 301 F.2d 102 (10th Cir. 1962).

[56] United States v. Duhart, 269 F.2d 113 (D.C. Cir. 1959). See Kapsalis v. United States, 345 F.2d 392, 394 (7th Cir. 1965), where the court held that the petitioner was not denied the effective assistance of counsel merely because of errors in trial strategy. See also Michel v. Louisiana, 350 U.S. 91, 101 (1955).

[57] See Frand v. United States, *supra* note 55, at 103.

[58] 326 F.2d 560 (9th Cir. 1964).

[59] *Id.* at 561.

[60] In Cerniglia v. United States, 230 F. Supp. 932, 936 (N.D. Ill. 1964), the court said counsel should be appointed, even where not requested, in all cases except those where the motion is completely groundless. See Report, 33 F.R.D. 367, 385 (1963), which states:

> We think it would promote orderly procedure if the legislature also provided appropriate legal assistance for inmates of Federal penal institutions in the preparation of their § 2255 petitions. The effect of this would not be to increase the number of such proceedings, but to enable the judge to determine more readily which petitions merit hearings and which do not. Under the present practice, frequently the judge feels constrained to order a hearing, fearing that there is no other way to ascertain the nature and merits of the case.

See also Campbell v. United States, 318 F.2d 874 (7th Cir. 1963).

[61] See Bishop v. United States, 350 U.S. 961 (1956), *reversing* 223 F.2d 582 (D.C.

a principle of long standing that an insane man may not be tried for a crime.[62] This principle is based on the belief that a defendant is entitled to be present at all stages of his trial[63] and that one who is mentally incompetent "may be as far removed from the proceeding as if physically absent."[64] The movant's failure to urge this contention at the time of his conviction does not prejudice his right to a hearing under section 2255.[65]

While mental incompetence at the trial is a ground for relief, mental incompetency at the time of the crime is not within the scope of section 2255, and must be raised on appeal.[66]

5. Convictions Based upon Perjured Testimony

The use of perjured testimony is within the scope of section 2255 if such testimony was procured with the knowledge of the government.[67] Two difficulties should be noted. First, the prisoner, bearing the burden of proof, must not only show that the evidence was knowingly and intelligently used by the government, but also that such testimony was material.[68] This is in contrast with the standard for evidence

Cir. 1955); Pledger v. United States, 272 F.2d 69 (4th Cir. 1959). Besides § 2255 relief, a prisoner whose mental incompetency was undisclosed at the trial might also avail himself of 18 U.S.C. § 4245 (1951). There is authority that this procedure should be used in lieu of § 2255. Nunley v. United States, 283 F.2d 651 (10th Cir. 1960).

62 Thomas v. Cunningham, 313 F.2d 934, 938 (4th Cir. 1963).

63 See Near v. Cunningham, 313 F.2d 929 (4th Cir. 1963); *cf.* Rakes v. United States, 309 F.2d 686 (4th Cir. 1962).

64 Thomas v. Cunningham, *supra* note 62, at 938.

65 Taylor v. United States, 282 F.2d 17, 23 (8th Cir. 1960); Lee v. Wiman, 280 F.2d 257 (5th Cir. 1960); Sanders v. United States, 205 F.2d 399 (5th Cir. 1953). Insanity at the trial should also be a ground for collateral attack in Ohio, if the claim has not been previously adjudicated (either at trial or on appeal), as procedural due process requires that a state shall afford a defendant an adequate opportunity to raise the issue. Smith v. Baldi, 344 U.S. 561, 568, 570 (1953); Parnell v. Cunningham, 302 F.2d 633, 634 (4th Cir. 1962). Recently, drug addiction has been held to be a basis for mental incompetency at the time of trial. Sanders v. United States, 373 U.S. 1 (1963). Pleadings have been held to be factually sufficient to command a hearing. Meadows v. United States, 282 F.2d 942 (5th Cir. 1960). The allegation that petitioner was placed in a mental hospital following his trial [Gregori v. United States, 243 F.2d 48 (5th Cir. 1957)], or that the trial judge recommended psychiatric care [Praylow v. United States, 298 F.2d 792 (5th Cir. 1962)] have been held sufficient.

66 See Nunley v. United States, 283 F.2d 651 (10th Cir. 1960); United States v. Lawrenson, 210 F. Supp. 422, 429 (D. Md. 1962).

67 United States v. Barillas, 291 F.2d 743 (2d Cir. 1961). For a discussion of perjured testimony, see Murray, "Convictions Obtained by Perjured Testimony: A Comparative View," 27 Ohio St. L.J. 102 (1966). The rule apparently originated in Mooney v. Holohan, 294 U.S. 103, 112 (1935).

68 Emzor v. United States, 296 F.2d 62 (5th Cir. 1961); United States v. Spadafora, 200 F.2d 140 (7th Cir. 1952).

which is the product of an illegal search and seizure, where the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.[69] Second, the courts have sometimes been strict in requiring detailed and specific factual allegations in the motion.[70] This may put an even greater burden on the prisoner, for evidence may be unavailable.

Each of these difficulties place an extreme burden on one alleging perjured testimony as a ground for relief. While there may be valid reasons for requiring that the perjury relate to material evidence and that the pleadings be detailed and specific, the requirements that the government knowingly use such evidence seems unreasonable. The fact that the defendant may be imprisoned for a crime which he did not commit cannot be ignored. Further, the fact that the perjured testimony was unwittingly used by the prosecutor does not change the fact that there was government action in indicting, trying, and convicting the defendant.[71]

It would seem that there are two possible solutions to this problem. First, the courts could simply dispense with the "knowledge" requirement by overruling the cases which make it a necessary element of the cause of action. Second, if the courts failed to act, the legislature could provide that the defendant's proving of "knowing use" by the prosecution was unnecessary. These suggestions are urged on the assumption that perjured testimony voids the conviction. With this as a premise, it necessarily follows that a means of correcting this error is available.

6. Denial of the Privilege Against Self-Incrimination

The fifth amendment provides the petitioner with the privilege against self-incrimination when called to testify.[72] A denial of this

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[69] Fahy v. Connecticut, 375 U.S. 85 (1963).

[70] See Note, 111 U. Pa. L. Rev. 788, 794-96 (1963).

[71] See Murray, "Convictions Obtained by Perjured Testimony: A Comparative View," 27 Ohio St. L.J. 102, 107 (1966), where the author stated:

> There is also a practical objection . . . . It is unrealistic in most cases to expect the police or the prosecuting attorneys to admit that they knew the testimony was perjured when it was introduced; it is even more unrealistic to expect that they will admit this fact when they were the instigators of the perjured testimony for an admission in either case might subject them to criminal or disciplinary proceedings. As a result, even though there may be no question that perjured testimony was used, it is virtually impossible to prove the knowledge of the prosecuting authorities because it will be the word of a confessed perjurer against the word of authorities.

[72] See McCormick, Evidence 288-90 (1954); 8 Wigmore, Evidence § 2251 (3d ed. 1940). See generally Orfield, "The Privilege Against Self Incrimination in Federal Cases," 25 U. Pitt. L. Rev. 503 (1964).

privilege voids the conviction and is within the scope of section 2255 relief.

The privilege applies in numerous circumstances.[73] One of the most important situations is where the prosecutor comments upon the defendant's silence.[74]

7. Coerced Confessions

Closely akin to the problem of self-incrimination is that of coerced confessions. A conviction based on a coerced confession is within the scope of collateral attack in federal court as well as in Ohio.[75] These confessions void the convictions because they are unreliable evidence, and because of their deterrent effect on improper police interrogation.[76]

A serious question in this area concerns confessions which are obtained by an unlawful delay prior to a preliminary hearing. There is dicta to the effect that if the prisoner is prejudiced by an unlawful delay and a confession therefrom, a ground for collateral relief might exist.[77] However, absent a showing of real prejudice, the admission of a confession at a plenary trial which was the result of an unlawful delay may not be a ground for collateral attack.[78]

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[73] See Orfield, *supra* note 72, at 506-07.

[74] See Griffin v. California, 380 U.S. 609 (1965), which held that neither the prosecutor nor judge may adversely comment upon defendant's failure to testify. *But see* Tehan v. Shott, 86 S. Ct. 459 (1966), which held that *Griffin* shall not be given retrospective application. The privilege against self-incrimination applies in state courts [See Griffin v. California, 380 U.S. 609 (1965)], and should therefore be a ground in Ohio under § 2953.21 for post-conviction relief.

[75] Reck v. Pate, 367 U.S. 433 (1961).

[76] See Note, 31 U. Chi. L. Rev. 313, 314 (1964). An example of a coerced confession would be one which was obtained after the administration of a "truth serum." Townsend v. Sain, 372 U.S. 293 (1963). Another would be one which was obtained after a statement by an arresting officer that defendant's children would not be taken from her if she "cooperated" [Lynumn v. Illinois, 372 U.S. 528 (1963)], or the defendant would not be allowed to call his wife until he "cooperated" [Haynes v. Washington, 373 U.S. 503 (1963)].

[77] Kristiansand v. United States, 319 F.2d 416 (5th Cir. 1963).

[78] See Hodges v. United States, 282 F.2d 858 (D.C. Cir. 1960), *cert. granted*, 365 U.S. 810, *cert. dismissed as improvidently granted*, 368 U.S. 139 (1961). This seems to be the general rule in Ohio as well. See Caldwell v. Hoskins, 176 Ohio St. 261, 199 N.E.2d 116 (1964). Such a rule lies in the assumption that this irregularity did not harm the defendant. This presumption might be valid when the record reflects the defendant knew and understood that the illegal confession could not be used, but seems less than satisfactory if the defendant is not fully aware of this fact. Entering a plea of guilty, when one believes he will be convicted by means of his confession, seems somewhat less than voluntary. This illustrates the importance of insuring that the accused is aware of his rights. For a discussion of coerced confessions, see generally, Ritz, "Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court," 19 Wash. & Lee L. Rev. 35 (1962); Comment, "The Coerced Confessions Cases in Search of a Rationale," 31 U. Chi. L. Rev. 313 (1964).

8. Denial of a Fair and Speedy Trial

One has a constitutional right to a fair and speedy trial, and a denial of such voids a conviction. However, before a delay becomes unconstitutional, it must be arbitrary and oppressive under the circumstances.[79] In determining if the delay was arbitrary or oppressive, the courts make use of the following policy considerations: (1) a speedy trial avoids prolonged imprisonment of the accused if he remains in jail until the trial; (2) a speedy trial relieves the accused from the anxiety and public suspicion to which he is subjected by the accusation of the crime; (3) a speedy trial prevents the accused from being tried so long after the alleged events that the means of establishing his innocence are no longer available to him.[80]

Each of these three factors should be considered anytime a denial of the right to a speedy trial is alleged. For example, a period of a two-years wait before trial may be arbitrary and oppressive in one instance,[81] and not in another.[82]

III. Res Judicata in Subsequent Applications

Prior to the decisions in *Sanders v. United States*,[83] there was some confusion concerning when a court might refuse on res judicata grounds a second application for relief.[84] This confusion terminated in *Sanders* when the Court announced the following guidelines:

1. Successive Motions on Grounds Previously Heard and Determined

A denial of relief may result where the same ground[85] presented in the subsequent motion was determined on the merits in the prior application adversely to the movant.[86]

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79 Waugaman v. United States, 331 F.2d 189 (5th Cir. 1964).

80 Koenig v. Willingham, 324 F.2d 62 (6th Cir. 1963).

81 Waugaman v. United States, *supra* note 79.

82 Koenig v. Willingham, *supra* note 80.

83 373 U.S. 1 (1963).

84 *Id.* at 6-8.

85 The Court defined "ground" to mean a legal basis for relief. The same ground can be proved by different sets of circumstances, and if doubts arise as to whether two grounds are different or the same, such doubts should be resolved in favor of the petitioner. 373 U.S. at 16.

86 The earlier denial must have rested on the merits of the ground presented in the subsequent motion. If relief was not denied because the files and records of the case conclusively showed the motion to be without merit, the earlier denial rested on the merits. 373 U.S. at 16. Where the same ground has earlier been rejected on the merits, the petitioner may still have a hearing. However, in such cases, the burden is upon the prisoner to show that the ends of justice will be served only if his case is redetermined. Where factual issues are involved, the prisoner is entitled to a hearing if he can show

2. The Successive Application Claimed to be an Abuse of the Remedy

No matter how many prior applications for federal collateral relief have been made, the movant is not barred from subsequent applications if: (1) he urges a different ground in the new application; or (2) the same ground if his earlier motion was not adjudicated on the merits. In either situation, full consideration of the new application can be avoided only if the government can show there has been an abuse of the remedy.[87]

The district judge has the discretion to deny the hearing as to those allegations which were raised earlier, or could have been, but were not raised in the earlier proceedings, unless the petitioner has some justification for not raising the issue on his earlier motion, such as being unaware of the significance of the relevant facts.[88] In the respect to the issues which were known and could have been raised, but were intentionally omitted, res judicata applies.

CONCLUSION

Generally, the federal grounds under section 2255 are those which were available under habeas corpus. These grounds are those which void the conviction because the conviction was obtained in violation of the constitutional rights of the defendant. The more important of these grounds are: (1) the coerced plea of guilty, (2) evidence obtained by illegal search and seizure, (3) the denial of counsel, (4) insanity at the time of the trial, (5) convictions based upon perjured testimony, (6) the privilege against self-incrimination, (7) the coerced confession, and (8) the right to a fair and speedy trial. Each of these grounds should be recognized as a basis for relief in Ohio.[89] At the same

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the first case was not fair. If the issue involved is a legal issue, the prisoner may be entitled to a new hearing upon showing an intervening change in the law or some other reason for having failed to raise a key issue in the earlier proceeding. 373 U.S. at 16-17.

[87] For example, if the applicant deliberately withheld a ground for relief at the time of filing his first application in the hope of being granted two hearings rather than one, he waives his right to a second hearing on the withheld ground. 373 U.S. at 18.

[88] See, *e.g.*, Hayes v. United States, 323 F.2d 954 (5th Cir. 1963); Burgess v. United States, 319 F.2d 345 (9th Cir. 1963); Bent v. United States, 308 F.2d 585 (8th Cir. 1962); Gant v. United States, 308 F.2d 728 (5th Cir. 1962); Lipscomb v. United States, 298 F.2d 9 (8th Cir. 1962); Birchfield v. United States, 296 F.2d 120 (5th Cir. 1961); Fiano v. United States, 291 F.2d 113 (9th Cir. 1961); Hamilton v. Wilkinson, 271 F.2d 278 (5th Cir. 1959).

[89] See Machibroda v. United States, 368 U.S. 487 (1962) (coerced plea of guilty); Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained by illegal search and seizure); Gideon v. Wainwright, 372 U.S. 335 (1963) (denial of counsel); Ohio Const. art. I, § 10 (insanity at the time of trial); Mooney v. Holohan, 294 U.S. 103 (1935) (convictions based on perjured testimony); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against

time, grounds relating to ordinary matters of procedure such as errors in the indictment, rulings on evidence, as well as matters relating to the guilt or innocence of the accused, probably will not be grounds for relief in Ohio, since such defects do not void the conviction on any constitutional ground.

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self-incrimination); Reck v. Pate, 367 U.S. 433 (1961) (coerced confession); Ohio Const. art. I, § 10 (fair and speedy trial).